Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF OHIO
Petitioner

-vs-

WILLIAM SINGFIELD, III
Respondent

PETITION FOR A WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County, Ohio

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QUESTIONS PRESENTED

I. DOES A TRIAL COURT COMMIT ERROR WHEN IT REQUIRES THE PROSECUTOR TO PUT FORTH HIS NEUTRAL REASONS ON THE RECORD FOR HIS PEREMPTORY CHALLENGE OF A BLACK JUROR WHERE THE DEFENDANT HAS NOT SET FORTH A PRIMA FACIE CASE OF INTENTIONAL DISCRIMINATION AND THERE IS NO EVIDENCE OF INTENTIONAL DISCRIMINATION ON THE RECORD.

II. WHEN A TRIAL COURT REQUIRES THE STATE TO PUT FORTH IT'S NEUTRAL REASON FOR EXCUSING A BLACK JUROR ON THE RECORD WITHOUT THE DEFENDANT PRESENTING A PRIMA FACIE CASE OF INTENTIONAL DISCRIMINATION AND FINDS NO INTENTIONAL DISCRIMINATION, CAN AN APPELLATE COURT REVIEW THE ENTIRE RECORD IN DETERMINING WHETHER THE TRIAL COURT'S DETERMINATION IS CLEARLY ERRONEOUS OR IS THE APPELLATE COURT LIMITED TO REVIEWING THE STATE'S NEUTRAL REASON WHEN REVIEWING THE ULTIMATE ISSUE OF NO DISCRIMINATORY INTENT.

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II. IN DETERMINING WHETHER THE TRIAL COURT'S RULING THAT THE PROSECUTOR DID NOT INTENTIONALLY DISCRIMINATE AGAINST A JUROR WAS CLEARLY ERRONEOUS, AN APPELLATE COURT SHOULD REVIEW THE ENTIRE RECORD.

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The decision of the Summit County Court of Common Pleas is reproduced in the Appendix at pages 70-74.

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O.R.C 2903.01 [Aggravated murder.] Reproduced at pages 75.

O.R.C. 2911.01 [Aggravated robbery.] Reproduced at page 75.

O.R.C. 2921.03 [Intimidation.] Reproduced at page 75-76.

O.R.C. 2923.13 [Having weapons while under disability.] Reproduced at page 76.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to invoke jurisdiction under 18 U.S.C. 1257(3). On April 6, 1993 the Defendant was convicted of Aggravated Murder, Aggravated Robbery, and Having A Weapon While Under Disability with gun specifications. The decision was reversed by the Court of Appeals for the Ninth Judicial District of Ohio on January 26, 1994. The Appellate Court found that the prosecutor discriminated against a black juror while exercising a peremptory challenge in violation of Batson v. Kentucky 476 U.S. 79 (1986). The State filed a memorandum in support of jurisdiction and the Ohio Supreme Court refused to take jurisdiction of this case on June 29, 1994. Petitioner prays that this Court grant the Petition For a Writ of Certiorari for the reasons that a state court in the instant case

has incorrectly decided important federal questions that must be settled by this Court.

STATEMENT OF THE CASE

The Juvenile Division of the Summit County Court of Common Pleas found Defendant not to be amenable to rehabilitation as a juvenile. On November 18, 1992, Judge Saundra Robinson relinquished jurisdiction of Defendant, and transferred jurisdiction to the Summit County Court of Common Pleas.

Defendant was indicted on one count of Aggravated Murder in violation of O.R.C. §2903.01(A) with a firearm specification. In a supplemental indictment, Defendant was also charged with one count of Intimidation in violation of O.R.C. §2921.03. In a second supplemental indictment, Defendant was charged with one count of Aggravated Murder in violation of O.R.C. §2903.01(B); one count of Aggravated

Robbery in violation of O.R.C. §2911.01(A); and one count of Having a Weapon While Under Disability in violation of O.R.C. §2923.13(A)(2) with a prior offense of violence specification. All counts in the second supplemental indictment were with a firearm specification.

Prior to trial, the State dismissed the original count of the indictment. After the State's case, the trial court dismissed the Intimidation count. A jury found Defendant guilty of Aggravated Murder, Aggravated Robbery, and Having a Weapon While Under Disability with all associated specifications.

The Court sentenced Defendant to life imprisonment with no parole eligibility except after twenty years of imprisonment for Aggravated Murder; ten to twenty-five years for Aggravated

Robbery; and three to five years for Having a Weapon While Under Disability. The Court also sentenced Defendant to three additional three year sentences for the firearm specifications. All sentences are to run consecutively.

Defendant appealed his convictions to the Ninth District Court of Appeals raising the assignment of error that the trial court committed error when it allowed the State to use a peremptory challenge in a racially discriminatory manner in violation of Defendant's constitutional rights. On January 26, 1994, the Ninth District Court of Appeals agreed with the Defendant and overruled the trial court's findings that there was no discrimination by the prosecutor. The Appellate Court reversed Defendant's convictions and remanded the case back to the trial court for a new trial. The State filed

a Motion for Reconsideration which was also denied by the Ninth District Court of Appeals. The State sought jurisdiction from the Ohio Supreme Court to appeal the Ninth District Court of Appeal's decision which reversed the trial court's Finding of Facts. On June 29, 1994, the Ohio Supreme Court refused to accept jurisdiction of this case. The State now files a Petition for a Writ of Certiorari to this Court.

STATEMENT OF THE FACTS

Michael Esterly was twenty-five years old and employed by Akron General Medical Center as a radiology technician. Michael worked second shift (3:00 to 11:00 p.m.). On Sunday, June 21, 1992, Jerry Taylor called Michael at work and asked Michael to meet him at the Old Campus Lounge near the University of Akron. Jerry had known Michael for eight years and they were best friends. Michael met Jerry at ten after eleven. Jerry eventually asked Michael to drive him over to his girlfriend's house on Donald Avenue. Michael had agreed to take him to that location. Michael was a good friend and had often loaned Jerry his car.

The two friends left the Campus Lounge at around 11:30 p.m. Before reaching the apartment complex, they stopped at the Dairy Mart on Wilbeth

Road. Jerry went in for a minute and then got back into Michael's car. Finally, they drove to Jerry's girlfriend's house on Donald Avenue. They sat in the car and talked about some problems Michael was having.

They were parked in the lot for less than five minutes when three males approached Michael's car. Two of the three males, Defendant and Lance Hale, were gang members. The third male, Demond Key, was not a gang member but he hung around with them.

Defendant moved to the driver's side of the automobile where Michael was sitting. Lance went to the passenger side by the door. Defendant asked Michael and Jerry if they knew anybody around there and they answered no. Defendant also asked if they were from around the area. Jerry said, "No, we know two girls that live right there."

After Jerry and Mike told them their names, the Defendant said, "Cooperate with my boy on the other side." Defendant proceeded to pull a shotgun out of his pants. Demond Key ran away after he saw the gun. Lance Hale also pulled a gun out of his pants.

As Jerry Taylor opened the passenger door to exit the automobile, Hale fired one shot into the passenger's side door. Defendant fired one shot from his shotgun point blank into Michael Esterly's head killing him instantly. Defendant and Hale ran away. After the shooting, Michael's car rolled down the parking lot. Jerry had gotten out of the car, and he ran to the Dairy Mart store to call the police.

When the police arrived, they found Michael Esterly's car in a wooded area. The police found Michael dead slumped over the front driver's seat of his

automobile. Michael had a large gunshot wound to his head and his brains were scattered all over the interior of the car. The passenger door was open, and it had a hole through it. The driver's side window was open three inches, with no damage to the glass or door.

The police talked to Jerry Taylor at the scene of the shooting. They talked to Jerry again at the Detective Bureau. He was very cooperative and gave the detectives a full statement regarding the shooting. Tests showed that Jerry had not fired any weapons. By the next morning, Jerry was no longer a suspect in the shooting. A couple of days after the shooting, Defendant reminded Demond Key that he did not see anything on June 21. The police interviewed people in the neighborhood and Defendant was linked to the shooting. Several weeks later,

Defendant was questioned by the police. He told them that he had been at a skating rink until 11:30 p.m. on the night of the shooting. He asserted that he went to a local bar and spent the rest of the evening at his sister's house on Miller Avenue.

The police spoke with juveniles in the area to check out Defendant's story. Defendant's story conflicted with the information obtained in the interviews with the other juveniles. On July 23, 1992, Defendant was arrested. Defendant proceeded to tell police two more conflicting stories about the evening that Michael Esterly was killed. After his arrest, Defendant called Demond Key's sister nine or ten times in an attempt to find out where Demond was living. At Defendant's trial, Demond Key testified that Defendant was at the scene of the shooting and that Defendant

was the person at the driver's side of the car who pulled a weapon on the two men. Ballistics evidence positively indicated that the shot killing Mr. Easterly came from the driver's side of the vehicle.

REASONS FOR GRANTING WRIT

I. A TRIAL COURT COMMITS ERROR WHEN IT REQUIRES THE PROSECUTOR TO PUT FORTH A NEUTRAL REASON ON THE RECORD TO JUSTIFY HIS PEREMPTORY CHALLENGE OF A BLACK JUROR WITHOUT THE DEFENDANT PRESENTING A PRIMA FACIE CASE OF INTENTIONAL DISCRIMINATION.

II. IN DETERMINING WHETHER THE TRIAL COURT'S RULING THAT THE PROSECUTOR DID NOT INTENTIONALLY DISCRIMINATE AGAINST A JUROR WAS CLEARLY ERRONEOUS, AN APPELLATE COURT SHOULD REVIEW THE ENTIRE RECORD ON REVIEW. THE DEFENDANT'S FAILURE TO PROVE A PRIMA FACIE CASE OF INTENTIONAL DISCRIMINATION SUPPORTS A TRIAL COURT'S FINDINGS THAT THERE WAS NO INTENTIONAL DISCRIMINATION BY THE PROSECUTOR.

The State of Ohio contends that a prosecutor's failure to delineate an appropriate race-neutral reason to excuse a black juror is not reversible error where the Defendant has failed to prove a prima facie case of intentional discrimination under Batson v. Kentucky 476 U.S. 79 (1986), and there is other evidence in the record to support the trial court's findings of no discriminatory intent by the prosecutor.

Contra, Hernandez v. New York 500 U.S. _____, 114 L.Ed.2d 395 (1991).

A brief history of this Court's equal protection decisions indicates that this Court has always presumed that a prosecutor[1] exercised his peremptory challenge in a non-discriminatory manner. This presumption[2] did not change under this Court's Batson decision.

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[1] The State uses the term prosecutor as it applies in this case but the party defending his peremptory challenge could be a defense attorney in a criminal case, Georgia v. McCollum 505 U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) or civil attorney, Edmonson v. Leesville Concrete Co. 505 U.S. 614 (1991).

[2] This presumption is not a legal presumption that changes the burden of proof.

In Strader v. West Virginia 100 U.S. 303, 305 (1880), this Court first held that it violated a black defendant's rights to equal protection of the law when a statute prohibited black persons from serving on a petit jury or grand jury. In Swain v. Alabama 380 U.S. 202 (1965), a black defendant argued that the system of peremptory jury challenges denied to him equal protection of the law by allowing the State through the exercise of peremptory challenges to exclude black jurors. Although the prosecutor used peremptory challenges to exclude all six black persons on the jury panel, the Swain Court found that "the presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court." Id. at 222. After this Court reviewed the long history of the

peremptory challenge which predates the U.S. Constitution, this Court noted that "the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the Court's control." (citations omitted) Id. at 220. This Court then concluded that the State need not specify its reason for giving a peremptory challenge. Id. at 222.

In Batson v. Kentucky 476 U.S. 79 (1986), the prosecutor used his peremptory challenges to strike all four black persons on the venire and a jury composed only of white persons was selected. This Court held that a black defendant was denied equal protection of the law when a prosecutor uses a peremptory challenge in a discriminatory manner to exclude black jurors on the jury panel. This Court in Batson found

that the Swain Court had recognized an equal protection violation in peremptory challenges when a prosecutor used his peremptory challenges in case after case to exclude black jurors. Id. at 91-92. The Batson Court rejected the evidentiary formulation of Swain and held that the Defendant could look to the prosecutor's peremptory challenges in his particular case to establish an equal protection violation. Id. at 92-93. This Court looked to the jury venire cases of race discrimination and held that a defendant could prove an equal protection violation in his case by systematic exclusion of blacks from the jury panel. Id. at 94-95. In Batson this Court set forth a three part test in order for the Defendant to prove an equal protection violation. First, the Defendant must prove a prima facie case of intentional discrimination. Id.

at 96-97. The Defendant can prove a prima facie case of intentional discrimination by showing a pattern of discriminatory peremptory challenges or by the prosecutor's statements during voir dire.[3] Id. at 97. After the Defendant presents a prima facie case of intentional discrimination, there is an inference of intentional discrimination. Id. at 96-97. The burden then shifts to the prosecutor to present a neutral explanation for his peremptory challenges. Id. at 97. The trial court then makes the ultimate determination of purposeful discrimination. Id. at 98. The Batson Court did not overrule the

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[3] The Batson Court specifically refused to define what type of evidence must be put forward by the Defendant to constitute a prima facie case of intentional discrimination. Batson at 97.

holding in Swain except in a footnote to indicate that any principles expressed in Swain which are contrary to Batson are overruled. Id. at 100, n.25.

The State contends that this Court intended Batson to be a logical extension of Swain except that the Court changed the evidentiary burden to prove intentional discrimination in the exercise of peremptory challenges. The Swain Court found that in a single case there was an irrebuttable presumption that the prosecutor used his peremptory challenge in a lawful manner without discriminatory intent. Swain at 222. In Batson, the Court changed this irrebuttable presumption to allow the Defendant to prove a prima facie case of intentional discrimination in his specific case. Batson at 95. However, the Batson Court clearly recognized that a prosecutor is assumed to have a non-

discriminatory purpose when exercising his peremptory challenge by stating that the Defendant bears the burden of proving a prima facie case of purposeful discrimination. Batson at 96. Further, the Batson Court also held that the Defendant bears the ultimate burden of persuasion with regard to the issue of intentional discrimination in the exercise of the peremptory challenge. Batson at 94, n.18. The Batson presumption that a prosecutor exercised his peremptory challenges properly without discriminatory intent is consistent with this Court's view that attorneys are presumed competent and to have made all decisions in the exercise of professional judgment. Strickland v. Washington 466 U.S. 688, 690 (1984). In Holloway v. Arkansas 435 U.S. 475, (1978), this Court stated, "Attorneys are officers of the Court, and 'when

they address the judge solemnly upon a matter before the Court, their declarations are virtually made under oath.'" Id. at 486, citing State v. Brazile, 222 La. 254, 75 So.2d, 856, 860-861 (1954). In Batson this Court also acknowledged this presumption of non-discriminatory intent by stating, "We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes." Batson at 99, n.22. When a trial court requires the State to put forth a neutral reason for its peremptory challenge without requiring the Defendant to set forth a prima facie case, the trial court presumes the prosecutor has exercised his peremptory challenge in a discriminatory manner. This presumption of intentional discrimination is contrary to this Court's opinion in

Batson v. Kentucky, supra. No member of the bar should be presumed to have exercised his peremptory challenge in a discriminatory manner.

Because this Court in Batson did not specifically define the Defendant's burden of proving a prima facie case of intentional discrimination, many courts now hold that a Defendant does not have to prove a prima facie case of intentional discrimination. Instead, the prosecutor must set forth his neutral reason for excusing a black[4] juror for every peremptory challenge of a black juror. State v. Jones, 293 S.C. 54, 57, 358 S.E.2d 701, 703 (S.C. 1987).

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[4] The juror could be any minority or white. See, Tursio v. U.S. 634 A.2d 1205 (D.C. App. 1993). The Batson challenges also apply to gender. J.E.B. v. Alabama ___U.S.___, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

In Jones the Court stated:

> Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a prima facie showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a Batson hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire. This bright-line test would ensure consistency by removing any doubt about when a Batson hearing should be conducted. Further, this procedure would ensure a complete record for appellate review.

Jones at 703.

The above rule has been adopted by the Missouri, Connecticut and Alabama Supreme Courts. State v. Parker 836 S.W.2d 930 (Mo. 1992); State Ex Rel. Harnell v. State 555 St.2d 263 (1990); State v. Holloway 209 Conn. 636, 553 A.2d 166 (1989), cert. denied, 490 U.S. 1071 (1989). The Jones rule that a prosecutor must present a neutral reason to explain every peremptory challenge of a minority juror is generally applied in Summit County cases and was applied in this case (T. p. 138-140,145). See, State v. Carr unreported Common Pleas Criminal No. 94-05-1202(B) (Judge Murphy 1994). [Jury Excerpt] Appendix at p. 77.

The State contends a trial court commits error under Batson when the Court automatically requires the prosecutor to put his neutral reason on

the record without the Defendant presenting a prima facie case of intentional discrimination. Although the State may not be prejudiced at the trial level if the Court allows the peremptory challenge, the issue raised by the State is what is the scope of review at the appellate level. In Hernandez v. New York 500 U.S. ____, 114 L.Ed.2d 395, 405 (1991), this Court seemed to answer this question:

> The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discri-

> mination litigation under Title VII of the Civil Rights Act of 1964 that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." United States Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 715,75 L.Ed 2d 403, 103 S.Ct. 1478 (1983). The same principle applies under Batson. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

The appellate court in this case, the Ninth District Court of Appeals, used

the above holding in reversing the instant convictions. State v. Singfield, Summit No. 16253, Ninth Judicial District (1/26/94) appendix at p. 43.

Although the State believes that Hernandez is distinguishable from the instant case in that the trial court in this case asked for a neutral reason from the prosecutor before there was an objection, the State believes the Ohio Ninth District Court of Appeals properly found that Hernandez is applicable to the case at bar. Therefore, the State requests this Court to reconsider the holding in Hernandez where this Court stated that an appellate court should not consider the defendant's failure to present a prima facie case of intentional discrimination when reviewing a Batson challenge. Further, the State challenges the holding in

Hernandez that the sole issue on appellate review of a peremptory challenge is the validity of the prosecutor's neutral reason for excusing the black juror.

In Hernandez this Court cited to U.S. Postal Services Board of Governors v. Aikens 460 U.S. 71 (1983), in support of the Court's decision. In that case the Plaintiff, Aikens, contended he was denied a promotion as a result of his race. At the trial court he presented statistical evidence that from 1966 through 1974 whites were consistently promoted over him, there was no derogatory information in his folder, that he had more supervisory experience than all whites promoted ahead of him, that he had substantially more education than the whites that were promoted ahead of him, and that the persons responsible for promoting him had made derogatory

comments about blacks in general. Id. at 713, n.2. Plaintiff argued that based on the above evidence, he had proven a prima facie case of discrimination. This Court indicated that the issue on review is not whether Aikens had proven a prima facie case, but whether the post office had intentionally discriminated against Aikens. Id. at 714. This Court held that in reviewing the evidence in that case, the plaintiff could prove his case directly by presenting evidence of discrimination, or indirectly by the showing that the defendant's proffered explanation is unworthy of credence. Id. at 716, citing Texas Department of Community Affairs v. Burdine 450 U.S. 248, 256 (1991). The State does not dispute the reasoning in Aikens that the plaintiff can produce relevant evidence of intentional discrimination through

the defendant's failure to provide an adequate reason why the plaintiff was not promoted. However, in Aikens the defendant's explanation why the plaintiff was not promoted did not decide the ultimate issue of intentional discrimination. Likewise, the failure of the State to provide a neutral reason for excusing a minority juror is not determinative of the ultimate issue of intentional discrimination in Batson cases. If in the present case the panel had consisted of eleven black jurors and one white juror, under Hernandez this Court would still reverse Defendant's conviction because the State did not provide an adequate neutral reason for excusing the one black juror. This case would still be reversed even if the prosecutor had peremptorily excused three white jurors and one black juror to get a jury panel that consisted of eleven black jurors.

In Batson this Court never specifically defined what evidence the Defendant needed to present to prove a prima facie case of intentional discrimination. Batson at 96-97. However, when this Court discussed the types of evidence that could be used to prove intentional discrimination, this Court never indicated that the State's failure to set forth a neutral reason for excusing a black juror could provide proof of intentional discrimination. Batson at 96-97.

The Batson case is now being interpreted to hold that the Defendant does not have any burden of proving intentional discrimination. Instead, the prosecutor has the burden of providing a neutral reason for every peremptory challenge. State v. Jones, supra. If the trial court allows the peremptory challenge, the only issue on

appeal is whether the State has set forth a neutral reason to justify the peremptory challenge. New York v. Hernandez, supra. The above formula completely relieves the Defendant of any burden of proving intentional discrimination and indicates that every peremptory challenge of a minority is an equal protection violation unless rebutted by the prosecutor. The above formula which was applied in this case is not within the holding of Batson v. Kentucky, supra. In Batson, this Court gave the Defendant an opportunity to prove intentional discrimination. Now, the trial courts are giving the State the opportunity to prove non-discrimination. Further, this Court has set forth a standard of appellate review that makes the prosecutor's neutral reason for explaining his peremptory challenge the dispositive issue of

intentional discrimination. Hernandez v. New York, supra; See, Elam v. Purkett 25 F.3d 679 (8th Cir. 1994); People v. Mays 254 Ill. App.3d 752, 626 N.E.2d 1154 (Ill. App. 1993).

The State maintains that this Court should hold that a trial court commits error when it requires a prosecutor to put forth a neutral reason for excusing a juror on every peremptory challenge of a minority juror without the Defendant presenting a prima facie case of intentional discrimination. If this case were a Title VII discrimination case, this Court would find error if the trial court informed the Plaintiff he did not have to go forward with evidence of intentional discrimination and then required the Defendant to present his case first and prove non-discrimination. The State also contends this Court should review the entire record to

determine whether the trial court's findings that the prosecutor did not intentionally discriminate against black jurors were clearly erroneous. Hernandez v. New York 500 U.S. ___, ___, 114 L.Ed.2d 395, 413 (1991). In U.S. Postal Service v. Aikens this Court stated, "As in any lawsuit, the Plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Aikens at 714, n.3.

Therefore, a reviewing Court should review the entire record in determining whether to affirm the trial court's findings that there was no intentional discrimination in the case. Here, the Ninth District Court of Appeals refused to look at the Defendant's failure to present evidence of intentional

discrimination because this Court's opinion in Hernandez v. New York precluded the Appellate Court from considering this evidence. See, Ninth District Court of Appeals ruling on State's motion for reconsideration, appendix at p. 43.

In this case, the Defendant did not present a prima facie case of discrimination. There were two blacks jurors on the jury panel and when the State excused one black juror, the State indicated it was not going to challenge for cause the other black juror that was going to sit on the panel.[5] Although the

[5] The first twelve jurors in the box will sit as jurors and the next two will be alternates. Parties will only strike jurors sitting in the first twelve positions and after a panel is seated will strike the alternates. Here, there was one black juror who sat on the panel

State had peremptory challenges left, it did not excuse the other black juror. The jury panel consisted of eleven whites and one black. Where there are two blacks on the panel and the State strikes one black juror and one black juror remains on the panel, there is no pattern of intentional discrimination. U.S. v. Young Bey 893 F.2d 178, 180-181 (8th Cir. 1990); U.S. v. Grandison 885 F.2d 143 (4th Cir. 1989) cert. denied 495 U.S. 934 (1990); U.S. v. Porter 831 F.2d 760 (8th Cir. 1987) cert. denied 484 U.S. 1069 (1989). Further, "if there are minority members on the jury but the prosecutor did not use all of his peremptory challenges, that would be a factor tending to refute discrimination" U.S. v. Betts 859 F.2d

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[5] Cont. of this case. This fact has never been disputed by the Defendant in the appellate courts.

1501, 1522 (6th Cir. 1988), rehearing denied, 889 F.2d 1088; Accord, U.S. v. Alvarado 951 F.2d 22, 26 (2nd Cir. 1991); U.S. v. Chinchilla 874 F.2d 695 (9th Cir. 1989); U.S. v. Lane 866 F.2d 103 (4th Cir. 1989). The prosecutor's reason for striking Ms. Sanford from the jury was that she was a female, had no children, and worked as a manager at a pharmacy. Because there were white jurors who also had no children and there is little significance to the fact that Ms. Sanford managed a pharmacy, an appellate court could draw an inference of discrimination from this explanation. However, there was nothing in the voir dire which indicated that the State questioned black jurors any differently than white jurors. Although the prosecutor's neutral reasons may not rebut an inference of discrimination, the failure to delineate an appropriate

neutral reason is not dispositive of the issue of intentional discrimination. The State maintains that a review of the entire record in this case indicates that the trial court's findings that there was no discriminatory intent by the prosecutor in excusing Ms. Sanford were not clearly erroneous. (T. p. 138-140) Appendix at p. 84. However, because the Ninth District Court of Appeals was precluded from reviewing the entire record in this case because of this Court's decision in Hernandez, the State requests this Court to accept certiorari of the case.

CONCLUSION

The State has presented two issues for this Court's review. The State contends that a trial court commits error when it requires the State to put forth a neutral reason for every peremptory challenge of a black juror. Further, in Hernandez v. New York, supra this Court held that once the prosecutor puts his neutral reasons on the record, the determination of whether the Defendant presented a prima facie case of intentional discrimination becomes moot. In Hernandez this Court disregarded the evidentiary burdens of Batson and indicated that once the prosecutor put his neutral reason on the record for excusing a minority juror, appellate courts must review the ultimate issue of intentional discrimination. However, in Hernandez

this Court only examined the prosecutors neutral reason to determine if the trial court's findings of no intentional discrimination were supported by the evidence. A reviewing court must review the entire record in determining whether the prosecutor intentionally discriminated against a black juror. Therefore, the failure of the Defendant to present a prima facie case of discrimination is not moot, but is relevant to support a trial court's findings that there was no discriminatory intent by the prosecutor. Based upon the above arguments, this Court should accept certiorari of this case.

A P P E N D I X

THE SUPREME COURT OF OHIO

1994 TERM

To wit: June 29, 1994

STATE OF OHIO, APPELLANT,	:	Case No. 94-584
v.	:	E N T R Y
WILLIAM SINGFIELD III, APPELLEE.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal.

COSTS:

Docket Fee, $40.00, paid by Lynn Slaby.

(Summit County of Appeals; No. 16253)

THOMAS J. MOYER
Chief Justice

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TATE OF OHIO	)	IN THE COURT OF
	)SS:	APPEALS
OUNTY OF SUMMIT	)	NINTH JUDICIAL DISTRICT

TATE OF OHIO	) C.A. NO. 16253
laintiff-Appellee	)
-vs-	)JOURNAL ENTRY
ILLIAM SINGFIELD, III	)
efendant-Appellant	)

This cause came to be heard upon the tate's motion for reconsideration and equest for hearing of the Decision and ournal Entry filed in this case on nuary 26, 1994. Upon review of the iefs submitted by both parties to the tion, the state's motion is denied.

The state suggests that this Court ssumed all of the venirepersons who mained on the jury panel at the end of e jury selection process were ucasian. A closer reading of our inion, however, reveals that the state mistaken in this belief. While we

stated that four of the twelve venirepersons who remained on the jury panel at the conclusion of voir dire had no children, and that each of these four jurors was Caucasian, we additionally footnoted that we were unable to discern from the record whether any African-Americans remained on the jury panel at the conclusion of the jury selection process. Appellant stated in its appellate brief that each of the four venirepersons who were similarly situated to the excluded African-American were Caucasian. The state did not contest that proposition. Regarding the composition of the remainder of the jury ultimately impaneled, we made no assumptions or independent findings of fact. We merely considered each of the arguments proffered by the parties to the appeal and analyzed these arguments in light of the record and the applicable case law.

Footnote number one of our opinion indicates that even if we were to assume that other African-Americans remained on the jury panel after the jury selection process, a Batson violation could be proven. This proposition is particularly well stated in United States v. David (C.A. 11, 1986), 803 F.2d 1567. In David the Court stated:

> "Batson rejects the view in Swain that the Equal Protection Clause only requires that black citizens not be deprived of jury service by being systematically excluded from petit juries; Batson rests on a rationale that blacks are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under Batson, the striking of one black juror for a racial reason

> violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown."

Id. at 1571. See, also, U.S. v. Gordon (C.A. 11, 1987), 817 F.2d 1538, 1541; U.S. v. Battle (C.A. 8, 1987), 836 F.2d 1084, 1086, U.S. v. Clemons (C.A. 3, 1988), 843 F.2d 741, 746-747; State v. Belcher (1993) 89 Ohio App.3d 24, 34.

Additionally, the state appears to urge this Court to ignore the United States Supreme Court's ruling in Hernandez v. New York (1991), 114 L.Ed.2d 395, and to reconsider whether Singfield proved a prima facie case of intentional discrimination. As discussed in our opinion, upon Singfield's objection based on Batson, the prosecutor attempted to justify his challenges with purportedly race-neutral

explanations. This situation closely resembles the one encountered by the United States Supreme Court in Hernandez, where the Court stated:

> "The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceedings need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that '[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer

> relevant.'*** The same principle applies under Batson. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."

Id. at ___, 114 L.Ed.2d at 405.

Accordingly, we overrule the state's motion for reconsideration.

WILLIAM R. BAIRD
JUDGE

DEBORAH COOK
JUDGE

Daniel B. Quillin, Judge
Dissents

cc: Lynn Slaby, Prosecutor, and Philip D. Bogdanoff, Assistant Prosecutor, 53 University Avenue, Akron, Ohio 44308.

Irving B. Sugerman, Attorney for Appellant, 867 Moe Dr., Suite G, Akron, OH 44310.

STATE OF OHIO	)	IN THE COURT OF
	)SS:	APPEALS
COUNTY OF SUMMIT	)	NINTH JUDICIAL DISTRICT
		C.A. NO. 16253

STATE OF OHIO	)	APPEAL FROM
	)	JUDGMENT ENTERED
Plaintiff-Appellee	)	IN THE COMMON
	)	PLEAS COURT
-vs-	)	COUNTY OF
	)	SUMMIT, OHIO
WILLIAM SINGFIELD, III	)	CASE NO.,
	)	CR 92-11-2897
Defendant-Appellant	)	

DECISION AND JOURNAL ENTRY

Dated: January 26, 1994

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam. Appellant, William Singfield, appeals from his conviction for aggravated murder without death specifications, aggravated robbery and having weapons while under disability. We reverse and remand the case for a new trial.

Singfield's appellate brief addresses ten assignments of error. Because we find appellant's first assignment of error to be meritorious, and reverse and remand accordingly, we will address only that assignment.

Assignment of Error I

"The trial court erred in permitting the State to use a peremptory challenge in a racially discriminatory fashion thereby denying appellant equal protection under the law as guaranteed by the United States and Ohio Constitutions."

Appellant argues that it was error for the trial court to permit the state to use a peremptory challenge to exclude an African-American female from the petit jury venire. We agree.

In the course of voir dire proceedings, the state questioned Adrienne Sanford, the thirteenth juror on the selection panel, as follows:

"MR. CALLAHAN:
Miss Sanford,
Ritzman Pharmacy,

what do you do for them?

"JUROR SANFORD:
I'm the manager.

"MR. CALLAHAN:
Which one do you manage?

"JUROR SANFORD:
On Copley-Hawkins.

"MR. CALLAHAN:
Are you married, ma'am?

"JUROR SANFORD:
Yes

"MR. CALLAHAN:
Children?

"JUROR SANFORD:
No

"MR. CALLAHAN:
What does your husband do?

"JUROR SANFORD:
He works for A. Schulman, blends plastics.

"MR. CALLAHAN:
Any military?

"JUROR SANFORD:
For me, no.

"MR. CALLAHAN:
For your husband?

"JUROR SANFORD:
He was in the army."

Additionally, Juror Sanford responded to the question of whether she knew any police officers as follows:

"JUROR SANFORD:
Yes, I have police officers that work at the same store I work in, they do parttime duty there.

"MR. CALLAHAN:
Who works out there with you?

"JUROR SANFORD:
There are seven different cops that rotate different days.

"MR. CALLAHAN:
Do you get to know any of them well?

"JUROR SANFORD:
Not personally, no.

"MR. CALLAHAN:
Anything about your knowledge with them cause you a problem sitting on the jury.

"JUROR SANFORD:
No.

"JUROR SANFORD:
My best friend is a
retired FBI agent."

The prosecution asked Sanford no other questions, nor did she volunteer any other information.

The prosecution utilized a peremptory challenge to strike Sanford, an African-American female from the venire. Trial counsel for appellant objected to the prosecution's peremptory challenge, citing Batson v. Kentucky (1986), 476 U.S. 79, 90 L.Ed.2d 69. The prosecutor then explained his reason for exercising the peremptory challenge as follows:

> "As for the individual involved, she has no children of her own. She worked at a pharmacy, manager of a pharmacy, as I recall, and just something in the way she answered her questions."

The trial court accepted the prosecutor's reasons and allowed the

prosecution to strike Sanford from the venire.

In Batson, supra at 86, 90 L.Ed.2d at 80, the United States Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." In so holding, the Court outlined a three-step process for use in determining whether the prosecution's use of a peremptory challenge to exclude a potential juror violates equal protection.

> "First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-

> neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York (1991), 500 US ____, 114 L.Ed.2d 395, 405, citing Batson, supra at 96-97, 90 L.Ed.2d at 87, 88.

In Hernandez, supra 500 U.S. at ____, 114 L.Ed.2d at 405, the United States Supreme Court addressed the defendant's burden of proving its prima facie case as follows:

> "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie case becomes moot."

In the case sub judice, the prosecutor did come forward with a purportedly race-neutral explanation. The trial judge accepted the prosecutor's explanation and allowed Sanford to be discharged from the venire. Accordingly, we may proceed to the second step of the Batson analysis.

In determining whether the prosecutor has articulated a race-neutral explanation for the peremptory challenge, a court is required to look at the facial neutrality of the explanation given by the prosecutor.

> "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in

> the prosecutor's explanation, the reason offered will be deemed race neutral."

Id. at _____, 114 L.Ed.2d 406. In determining whether the prosecutor's articulated reasons for exercising a peremptory challenge are sufficiently race-neutral, the United State Supreme Court has emphasized that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." Batson, supra, at 97, 90 L.Ed.2d at 88. Nevertheless, the Court stated that "[t]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors on the assumption - or his intuitive judgment - that they would be partial to the defendant. Id. The prosecutor is required to give a clear and reasonably specific explanation of his legitimate

reasons for exercising the challenges. Id. at n.20.

The statement by the prosecuting attorney that "there was just something in the way that she answered the questions" is clearly an intuitive judgment of partiality which does not constitute a sufficiently race-neutral explanation under Batson. See Id. The prosecutor's other stated reasons - that Sanford had no children and worked at a pharmacy - are race-neutral on their face. Accordingly, we proceed to the third step of the Batson analysis.

The third step of the Batson analysis requires the Court to reach the ultimate issue of whether the prosecutor's race-neutral explanation was merely a pretext for purposeful discrimination. Batson at 98, 90 L.Ed.2d at 88-89. At this point the trial court is required to "decide on the basis of all the evidence

whether a denial of equal protection will result if it overrules the defendant's objection to the prosecutor's exercise of the challenge." U.S. v. Horsely (C.A. 11, 1989), 864 F.2d 1543, 1545. The trial court's decision concerning the ultimate question of discriminatory intent represents a finding of fact. Accordingly, we accord great deference to the trial court's finding on appeal. Hernandez, at _____, 114 L.Ed.2d at 409. Upon review of the appellate record, crediting the trial court's decision with all consistent, reasonable assumptions and according the trial court great deference in assessing the prosecutor's credibility, we are left with the conclusion that the trial court took an impermissible view of the evidence.

Appellant directs this Court's attention to four Caucasian petit jurors who, like Sanford, stated during voir dire that they did not have children. Jurors Renee Burke and Lisa Paxton each stated that she was married and had no children. Additionally, jurors Jeff Messner and Allan Kansy were single with no children. "Disparate treatment of venirepersons giving similar answers during voir dire is a factor which 'weigh[s] heavily against the legitimacy of any race-neutral explanation.' State v. Belcher (1993), 89 Ohio App.3d 24, 34, citing Slappy v. Florida (Fla.App. 1987), 503 So.2d 350, 355, certiorari denied (1988), 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909.

In Belcher, supra, the Tenth District Court of Appeals reversed and remanded a criminal case for a new trial after sustaining an appeal for post-conviction

relief on an ineffective assistance of counsel theory. Appellant's ineffective assistance of counsel theory was based on defense counsel's failure to raise a Batson challenge. Part of the Court's reason for holding that defense counsel's failure to raise a Batson challenge constituted ineffective assistance of counsel was that the prosecution used a peremptory challenge to strike an African-American from the venire, while failing to challenge a similarly situated Caucasian.[1] In

[1] The Belcher Court additionally relied on the fact that the prosecution utilized peremptory challenges to exclude all three African-Americans sitting on the jury venire. Such a pattern of strikes against African-American jurors raises an inference of intentional discrimination with respect to the prosecutor's use of peremptory challenges. Batson v. Kentucky (1986), 476 U.S. 79, 97, 90 L.Ed.2d 69, 88. The Belcher court, however, went on to cite U.S. v. Clemons (C.A. 3, 1988), 843 F.2d 741, 747, certiorari denied (1988), 488 U.S. 835, 102 L.Ed.2d 73, for the proposition that the utilization of a single peremptory challenge in a

explaining why the prosecution utilized a peremptory challenge against one of the African-American jury members the prosecutor stated:

> "The reason that I was unsure about her is that she is a gun owner, keeps a gun for home defense, and she has been through this police training and apparently she goes out once a month and shoots a gun. While I certainly don't have anything against that, it did make me wonder whether she would be more sympathetic than I wanted her to be for someone to go out and purchase a gun two days before a homicide and wait in the street. That's why I struck her."

Id. at 31. The Appellate Court went on to determine that the prosecution's stated reason for striking that juror

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[1] Cont. discriminatory fashion constitutes a Batson violation.

was pretextual. Specifically, the Court pointed out that the prosecution failed to exercise a peremptory challenge on a Caucasian venireperson who possessed the same characteristic of owning a gun for the purpose of self-defense. Similarly, in the case sub judice, we believe that the prosecutor's claims that he exercised the peremptory challenge because the African-American venire-person worked at a pharmacy and had no children were pretextual.

As previously mentioned, four out of the twelve venirepersons who remained on the jury panel at the conclusion of voir dire had no children. Each of these jurors was Caucasian.[2] The only other reason the prosecutor articulated for exercising a peremptory challenge

[2] We are unable to discern from the record whether any African-Americans remained on the jury panel at the conclusion of the jury selection process.

against Sanford was the fact that she managed a pharmacy. The prosecutor did not attempt to specify how that fact could detrimentally influence the excluded venireperson regarding the state's case. Accordingly, Batson mandates that we reverse and remand this case for a new trial.

While we realize that it may be burdensome for a prosecutor to specifically articulate legitimate, race-neutral reasons that are particular to the case which is to be tried when peremptorily challenging minority venirepersons, we believe that such an explanation is what is required in response to a challenge based on Batson and its progeny. We are bound by the precedential value of cases decided by the United States Supreme Court which interpret the United States Constitution and therefore must rule accordingly,

without regard to the harshness of the consequences or differences of opinion. We believe that appellant has carried his burden in proving a Batson violation and rule accordingly.

-

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period of review shall begin to run. App.R.22(E).

Costs taxed to Appellee.

Exceptions.

WILLIAM R. BAIRD
FOR THE COURT

BAIRD, J.
COOK, J.
CONCUR

QUILLIN, P.J.
DISSENTS SAYING

As noted in Hernandez v. New York (1991), 500 U.S. ____, 114, L.Ed.2d 395, the trial judge's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal. Id. at 408. It is "a pure issue of fact." Id. at 409.

Hernandez instructs us:

> "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory

> challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province."

Id. at 409.

The trial judge here found that the challenge was not based on purposeful discrimination. The trial judge, not we, was in the courtroom and heard the statements of the participants and observed their demeanor.

I would not disturb the trial judge's factual determination.

APPEARANCES

LYNN SLABY, Prosecuting Attorney and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308 for Appellee

IRVING SUGERMAN, Attorney at Law 867 Moe Dr., Suite G, Akron, OH 44310 for Appellant

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

January Term 1993

THE STATE OF OHIO No. CR 92-11-2897

vs. JOURNAL ENTRY

WILLIAM SINGFIELD, III

PAGE ONE OF TWO PAGES

THIS DAY, to-wit: The 6th day of April, A.D., 1993, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, WILLIAM SINGFIELD, III, being in Court with counsel, GEORGE C. PAPPAS, for sentencing; having heretofore on April 2, 1993, been found GUILTY by a Jury Trial of AGGRAVATED MURDER, as contained in Count Three, (3) of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT THREE, AGGRAVATED ROBBERY, as contained in Count Four (4) of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT FOUR, HAVING

WEAPON WHILE UNDER DISABILITY, as contained in Count Five (5) of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT FIVE and SPECIFICATION TWO TO COUNT FIVE.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said, and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, WILLIAM SINGFIELD, III, be committed to the Ohio Department of Rehabilitation and Correction for an actual Three (3) Three Years mandatory sentence for possession of firearm, and for LIFE IMPRISONMENT with parole eligibility after Twenty (20) Full Years, pursuant to Ohio Revised Code

Section 2929.03(A), for punishment of the crime of AGGRAVATED MURDER, Ohio Revised Section 2903.01(B), a special felony; for an actual Three (3) Years mandatory sentence for possession of a firearm, and for an indeterminate period of not less than Ten (10) Years and not more than the maximum of Twenty-five (25) Years for punishment of the crime of AGGRAVATED ROBBERY, Ohio Revised Code Section 2911.01(A)(1) and 2911.01(A)(2), an aggravated felony of the first (1st) degree, and for an actual Three (3) Years mandatory sentence for possession of a firearm, and for an indeterminate period of not less than Three (3) Years and not more than the maximum of Five (5) Years for punishment of the crime of HAVING WEAPON WHILE UNDER DISABILITY, Ohio Revised Code Section 2923.13(A)(2), a felony of the fourth (4th) degree, and that the said Defendant pay the costs of

this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, County Safety Building, 53 University Avenue, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the sentence imposed on each of three (3) mandatory sentences be served CONSECUTIVELY and not concurrently with each other.

IT IS FURTHER ORDERED that the sentence imposed in Counts Three (3), Fourth (4), and Five (5) of the Supplement One to Indictment be served CONSECUTIVELY and not concurrently with each other.

IT IS FURTHER ORDERED that the Defendant be given credit for all time served locally while awaiting disposition of this case.

IT IS FURTHER ORDERED that the Defendant's oral Motion for New Trial is hereby OVERRULED.

Thereupon, the Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court, and further appoints Attorney IRVING SUGERMAN as counsel for purposes of appeal.

APPROVED:
April 8, 1993
cvd

GLEN B. MORGAN, Judge
Court of Common Pleas
Summit County, Ohio

Section 2903.01 [Aggravated murder.]

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

* * *

Section 2911.01 [Aggravated robbery.]

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following;

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

* * *

Section 2921.03 [Intimidation.]

(A) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of his duty.

(B) Whoever violates this section is guilty of intimidation, a felony of the third degree.

* * *

Section 2923.13 [Having weapons while under disability.]

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

* * *

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,) CASE NO. 94-05-1202B

Plaintiff,)

vs.) TRANSCRIPT OF

) PROCEEDINGS

MILLARD CARR, JR.)

Defendant) EXCERPT

APPEARANCES:

ROE FOX, Assistant Prosecutor,

On behalf of the Plaintiff;

DOUGLAS MAHER, ESQ.,

On behalf of the Defendant.

- - -

BE IT REMEMBERED, that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the HONORABLE JAMES E. MURPHY, and commencing on Monday, August 29, 1994, the following proceedings were had, being an EXCERPT TRANSCRIPT OF PROCEEDINGS.

GARY A. MAHARIDGE
Official Court Reporter

OFFICIAL COURT REPORTER - C.A.T.

* * * Beginning of Excerpt * * *

MR. MAHER: On the basis of U.S. vs. Bruton, I wish to make an objection to the peremptory challenge to Mr. Harvey Smith. Let me state for the record, Mr. Smith is black. Presently, the present jury panel consists of, prior to the -- his excuse ten white jurors and two black potential veneer members. There were no further black veneer members possible in this case.

I believe that Mr. Smith, during the course of the questioning, answered all questions forthrightly and indicated that he did not have a predisposition in any way, and I would ask the Court to order that Mr. Smith stay on the panel.

THE COURT: Mr. Fox?

Additionally, he knows the two at least -- well, he knows the two witnesses expected to be called by the defendant.

THE COURT: Sufficient reason, motion overruled.

* * * End of Excerpt * * *

CERTIFICATE

I, Gary A. Maharidge, do hereby certify that as such Reporter I took down in Stenotypy all of the proceedings had in the foregoing transcript; that I have transcribed my said Stenotype notes into typewritten form as appears in the foregoing transcript; that said transcript is the complete form of the proceedings had in said cause and constitutes a true and correct transcript therein.

Gary A. Maharidge, Notary Public
within and for the State of Ohio
My commission expires November 17, 1998.

TRANSCRIPT OF PROCEEDINGS:

STATE V. SINGFIELD

MR. CALLAHAN:
Your Honor, the State would thank and excuse Miss Sanford.

THE COURT:
We will have the court reporter.

(The following proceedings were had out of the presence of the prospective jury panel.)
For the record, gentlemen, Miss Sanford is a black Afro-American woman -- the Defendant is black -- is one of two Afro-Americans. Do you want to state on the record now the reasons for your excusing Mrs. Sanford?

MR. CALLAHAN:
Has there been an objection?

MR. PAPPAS:
I object based on Batson.

MR. CALLAHAN:

Judge, first of all, I think the Batson challenge has to show a pattern. There's still one Afro-American individual on the panel that the State did not exercise a challenge for cause prior to this exercise a challenge for cause.

As for the individual involved, she has no children of her own. She worked at a pharmacy, manager of a pharmacy, as I recall, and just something in the way she answered her questions.

MR. PAPPAS:
I don't think that satisfies Batson.

MR. CALLAHAN:
Batson doesn't say you can't bump any black jurors.

THE COURT:
I think you have to demonstrate a non --

MR. PAPPAS:
You have to have a neutral-based reason.

MR. CALLAHAN:
I think it's enough, Judge, based upon the circumstances surrounding. I don't think you have to take it on an individual juror basis, it's based upon a pattern.

THE COURT:
I think every time you excuse a black, you have got to go on the record and indicate --

MR. CALLAHAN:
That's not the state of the law, Your Honor.

THE COURT:
All right.

MR. PAPPAS:
But any general excuse, I mean, it still doesn't satisfy Batson. You are conning up an excuse because you didn't like the way she answered her question.

MR. CALLAHAN:
That's the purpose of the voir dire.

MR. PAPPAS:

In what way didn't you like the way she answered her question? It only reflects the reason she was excused is because she's black.

MR. CALLAHAN:
I don't think there's anything about it that says that the only reason she was excused is because she was black: female, no children, works at a pharmacy, she works at a pharmacy over on Wooster-Hawkins, I'm sorry, Copley Road.

MR. PAPPAS:
That's more reason to keep her on.

MR. CALLAHAN:
I don't think so.

THE COURT:
That's the reason you put on, is that it?

MR. CALLAHAN:
That's correct.

THE COURT:
Proceed. We will get back on the record.
* * *

THE COURT:
Before we got started, we have a bench conference on the challenge of Adrienne Sanford, peremptory challenge, and the statements were made on the record, and the Court finds that the prosecutor indicated racially neutral reasons for the challenge of Adrienne Sanford. All right. Call the jury.

NO. 94-591

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF OHIO

Petitioner

-vs-

WILLIAM SINGFIELD, III

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH DISTRICT COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DOES A TRIAL COURT ERR WHEN IT APPLIES NEW YORK v. HERNANDEZ IN A CASE INVOLVING THE PEREMPTORY CHALLENGE OF A BLACK JUROR?

II. DOES AN APPELLATE COURT ERR WHEN IT REVIEWS THE ENTIRE RECORD AND DETERMINES THAT THE PROSECUTOR'S CLAIMS AS TO WHY HE EXERCISED A PEREMPTORY CHALLENGE WERE PRETEXTUAL?

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OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's identification as to Opinions Below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

Respondent was convicted of Aggravated Murder, Aggravated Robbery and Weapon Under Disability on April 6, 1993. The convictions were reversed, and the case remanded for a new trial on January 26, 1994 by the Court of Appeals for the Ninth Judicial District, Summit County, Ohio. Following denial of Petitioner's Motion for Reconsideration, Petitioner filed a Memorandum in Support of Claimed Jurisdiction with the Ohio Supreme Court, which was unanimously denied on June 29, 1994.

Respondent's convictions were reversed because the Prosecutor used a peremptory challenge in a racially discriminatory fashion.[1]

The Prosecutor in this case dismissed Adrienne Sanford, an African-American female, from the venire because "... she had no children of her own, (s)he worked at a pharmacy, as I recall, and just something in the way she answered her questions."

The Ninth District Court of Appeals found that "... the prosecutor's claims that he exercised the peremptory challenge because the African-American venire person worked at a pharmacy and had no children were pretextual". The Court noted that four out of the twelve venire persons who remained on the jury panel at the conclusion of voir dire had no children, and each of these four jurors was Caucasian.

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[1] Nine (9) additional assignments of error were raised in the Court of Appeals but were not passed upon due to the disposition of Respondent's First Assignment of Error.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

Petitioner contends that the trial court erred when it required the Prosecutor to state a neutral reason for his exercise of a peremptory challenge against a Black female prospective juror without the Defendant presenting a prima facie case of intentional discrimination. The Court of Appeals correctly decided this issue in accordance with this Court's decision in Hernandez v. New York, 500 U.S. _____, 114 L.Ed.2d 395 (1991), and its decision does not conflict with any decision of this Court or any Ohio Supreme Court case.

Furthermore, the Petitioner did not object to the procedures utilized by the trial court and did not raise this issue in any court below. Petitioner's failure to do so constitutes waiver, and prevents this Court from considering this issue. For both of the foregoing reasons, this issue does not warrant further review.

Petitioner also claims that a reviewing court should review the entire record in determining whether to affirm the trial court's findings that there was no intentional discrimination, and alleges that the Ninth District Court of Appeals refused to review the entire record of this case when it reversed Respondent's convictions. Petitioner's claims are not supported by the record.

The Ninth District Court of Appeals specifically held:

> Upon review of the appellate record, crediting the trial court's decision with all consistent, reasonable assumptions and according the trial court great deference in assessing the prosecutor's credibility, we are left with the conclusion that the trial court took an impermissible view of the evidence. (Pet. App. 60) (Emphasis added)

The Ninth District Court of Appeals also stated that it "... considered each of the arguments proffered by the parties to the appeal and analyzed these arguments in light of the record and the applicable case law" in its Journal Entry denying Petitioner's Motion for Reconsideration (Pet. App. 44) (Emphasis added).

Accordingly, Petitioner's claim that this Court should accept certiorari of this case because the Ninth District Court of Appeals was precluded from reviewing the entire record is totally unsupported by the record of proceedings below and affords no basis for review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **RESPONDENT'S BRIEF IN OPPOSITION** was served by regular U.S. Mail, postage prepaid, this 26 day of October, 1994, upon Philip D. Bogdanoff, Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308.

IRVING B. SUGERMAN
Counsel for Respondent